(22)

No. 98-404

In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,
Appellants,

v.

UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

REPLY BRIEF FOR APPELLEES NATIONAL KOREAN AMERICAN SERVICE & EDUCATION CONSORTIUM, INC., *et al.* IN SUPPORT OF APPELLANTS

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RULE 29.6 LISTING

Organization of Chinese Americans, Inc. is the corporate parent of Organization of Chinese Americans, Los Angeles, California Chapter. Other appellee corporations associated in this action with National Korean Service & Education Consortium, Inc. have neither corporate parents nor subsidiaries required to be listed pursuant to Sup. Ct. R. 29.6.

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OPINION BELOW

The opinion of the district court, *J.S.* 1a, is reported at 11 F. Supp. 2d 76 (D.D.C. 1998).[1]

[1] References to the jurisdictional statement are cited as "*J.S.*"; references to the lower court's opinion are cited as "*Op.*"; references to the joint appendix are cited as "*App.*"; references to the brief of the plaintiff House of Representatives are cited as "*Pl.Br.*"

STATEMENT OF THE CASE

This case comes before the Court on the district court's summary judgment prohibiting the use of statistical sampling for purposes of apportionment. Intervenor-defendants below presented substantial evidence that the use of statistical sampling would result in a more accurate census than would the exclusive use of traditional methods of enumeration, and would reduce, if not eliminate, the chronic problem of the differential undercount of the nation's minority population.[2] Although the district court found the differential undercount of minorities to be "among the most troubling aspects of the census in the late 20th century,"[3] that court made no findings concerning intervenor-defendants' evidence, but examined only the text and legislative history of the Census Act to conclude that the Act prohibits the use of statistical sampling for purposes of apportionment.[4]

The plaintiff House of Representatives and *amici* in support of the plaintiff disregard the proof of the greater accuracy that will result if statistical sampling is used in the 2000 census.[5] The plaintiff seeks to persuade this Court to make a factual inference in its favor based on the bald assertion that statistical sampling methodologies will not be more accurate to the extent that they are subject to political manipulation. Such an inference is inappropriate because the plaintiff moved for summary judgment and, therefore,

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[2] *See* Declaration of Leobardo F. Estrada at ¶ 44, *App.*419.

[3] *Op.*, *J.S.*3a n.2.

[4] *J.S.*45a-64a.

[5] Plaintiffs Glavin, *et al.*, in *Clinton, et al.* v. *Glavin, et al.*, 98-564, make this error in presenting their arguments as well. *See* Brief for Appellees, Matthew J. Glavin, *et al.* (November 3, 1998).

defendants' and intervenors' evidence must be viewed in the light most favorable to defendants and intervenors for purposes of the plaintiff's motion and this appeal. The plaintiff's position is untenable in light of the outside peer review structure the Census Bureau has devised to insulate the statistical processes of the Census from political interference and to assure the objectivity, scientific validity, and integrity of the 2000 census.[6] On this record it must be accepted that the use of statistical sampling in the decennial census will be more accurate than the exclusive use of traditional methodologies and will substantially alleviate the chronic problem of the differential undercount of the nation's racial and ethnic minority population.

In any event, the susceptibility of traditional methods of enumeration to political biases as compared to statistical sampling methods is not at issue in this case. Nor can the inherent wisdom of the Secretary's choice of census methodologies be questioned so long as he acts within the confines of the Census Act and the Constitution. The only issues before this Court are whether the Census Act or the Constitution prohibits the Secretary from using statistical sampling in determining the population for purposes of apportionment. The wisdom of the Secretary's choice in exercising his discretion is not an issue before the Court.[7]

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[6] *Census 2000 Report*, *App.*128-132.

[7] Nonetheless, with respect to the plaintiff's concern regarding political manipulation, the constitutional principles of equal representation and equal protection provide the necessary safeguards to ensure the accuracy of the Secretary's chosen method. *See* Brief For Appellees National Korean American Service & Education Consortium, Inc., et al. In Support Of Appellants, *United States Department of Commerce, et al.* v. *United States House of Representatives, et al.*, 98-404 (October 6, 1998).

SUMMARY OF THE ARGUMENT

The plaintiff's interpretation of the Census Act is based on a fundamental mistake — fatal to its entire argument — of ignoring the part of the statute that disproves its argument. The plaintiff disregards section 141(b) in order to argue that Congress intended section 141(a) to provide only general guidance on the issue of sampling in the context of congressional apportionment whereas section 195 provides specific guidance. The plaintiff is wrong.

The plain text of section 141 — particularly sections 141(a) and 141(b) — and section 195 together demonstrate Congress's intent to permit sampling for a number of purposes, including the purpose of apportionment of Representatives in Congress among the several states. In 1976, Congress amended the statute specifically to allow sampling and specifically made changes in all three of these sections to ensure a consistent reading of the statute. In section 141(a), Congress provides that sampling procedures are permissible ways in which to undertake a decennial census of population. In section 141(b), Congress specifically states that the tabulation of the decennial census as prescribed by section 141(a) is required for the "apportionment of Representatives in Congress among the several States." Consistent with sections 141(a) and 141(b), the introductory clause of section 195 accords the Secretary discretion to use sampling for apportionment purposes, and the main clause of section 195 requires the Secretary to use sampling for non-apportionment purposes if feasible. The words of the statutory provisions speak for themselves, stating clearly that the Census Act allows the use of sampling in the apportionment process.

ARGUMENT

SECTIONS 141 AND 195 OF THE CENSUS ACT PERMIT THE SECRETARY TO USE SAMPLING IN THE DECENNIAL CENSUS FOR THE PURPOSE OF APPORTIONMENT OF THE U.S. HOUSE OF REPRESENTATIVES

The Plaintiff Did Not Consider The Plain Language Of Section 141 In Its Entirety

The plaintiff's entire argument rests on a flawed analysis of section 141 of the Census Act. The plaintiff selectively focuses on section 141(a) — disregarding another key subsection — in order to argue that section 141(a) is a general authorization provision and that "§ 141(a) is not targeted specifically to determining the population for apportionment purposes." *Pl.Br.*28. From this ill-conceived premise that section 141(a) is merely a general provision, the plaintiff proceeds to argue erroneously that section 195 is the more specific provision purportedly containing the specific prohibition on the use of sampling for the purpose of congressional apportionment.

The flaw that undermines the plaintiff's entire argument is the failure to address section 141(b). This subsection specifically confirms that the grant of discretion to the Secretary to use statistical sampling in all aspects of the census found in section 141(a) applies to the Secretary's determination of the population for the purpose of congressional apportionment. Tellingly, the plaintiff's brief does not contain a single reference to section 141(b).

The text of section 141(a) and section 141(b) is explicit. Section 141(a) states:

> The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date," in such form and content as he may determine, *including the use of sampling procedures and special surveys*. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

13 U.S.C. § 141(a) (emphasis added). On its face, section 141(a) authorizes the Secretary to use sampling in the decennial census, which is the census used to determine the population for purposes of congressional apportionment. Even the district court stated that section 141(a) "standing alone appears to permit statistical sampling in congressional apportionment." *Op., J.S.*61a. In fact, section 141(a) is the sole provision authorizing the Secretary to conduct the constitutionally required decennial census for congressional apportionment entrusted to Congress under Article I, Section 2, Clause 3.[8] Still, the plaintiff argues that section 141(a) is "not targeted specifically" to apportionment *Pl.Br.*28, and instead is a "broad general grant[] of authority." *Pl.Br.*29.

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[8] *See Wisconsin* v. *City of New* York, 517 U.S. 1, 19 (1996) (citing section 141(a) as the provision by which "Congress has delegated its broad authority over the census to the Secretary").

Section 141(b), which the plaintiff overlooks, directly links section 141(a) and congressional apportionment. Section 141(b) states:

> The tabulation of total population by States *under subsection (a) of this section as required for the apportionment of Representatives in Congress* among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

13 U.S.C. § 141(b) (emphasis added). Therefore, sections 141(a) and 141(b) clearly demonstrate that the statute authorizes the Secretary to use statistical sampling in conducting the decennial census for apportionment purposes.

Indeed, section 141(b) was *specifically* amended by Congress in 1976 to be read in conjunction with section 141(a). Congress *added* the following critical language — "*under subsection (a) of this section*" — to section 141(b) in 1976. H.R. Rep. No. 94-944, at 11 (1976). The text makes clear that Congress intended the scope of section 141(a) to encompass section 141(b)'s explicit reference to "the apportionment of Representatives in Congress among the several States."

Instead of addressing section 141(b), the plaintiff turns to other portions of the statute to buttress its proposition that section 141(a) is a broad, general provision without any specific authority. However, the other provisions upon which the plaintiff relies actually reinforce section 141's specific grant of discretion to the Secretary to use sampling for the purpose of congressional apportionment.

First, the plaintiff relies heavily on section 141(d) to argue that the reference to sampling in section 141(a) does not carry independent force because section 141(d), which applies to the mid-decade census *not* used for apportionment, contains the same reference to sampling. *Pl.Br.*30-31. To justify its interpretation of section 141(d), the plaintiff correctly cites to its companion section 141(e). Section 141(d) states, "the Secretary, in the year 1985 and every 10 years thereafter, shall conduct a mid-decade census of population *in such form and content as he may determine, including the use of sampling procedures and special surveys.*" *Pl.Br.*30 *citing* 13 U.S.C. § 141(d) (emphasis added by the plaintiff). The authorization to use sampling under section 141(d) is then qualified by section 141(e)(2), which expressly prohibits the use of any information obtained in any mid-decade census (as opposed to the decennial census) for purposes of apportionment. 13 U.S.C. § 141(e)(2).

However, the plaintiff's analysis of section 141(a) is based on a stunning oversight: section 141(b) — which goes hand in hand with section 141(a). In fact, as discussed above, section 141(b) contains an explicit reference to section 141(a) and congressional apportionment. Thus, while the same reference to sampling is made in both sections 141(d) and 141(a), section 141(e) expressly prohibits the use of mid-decade census data for purposes of apportionment, but in contrast, section 141(b) *expressly permits* the use of sampling in the decennial census for the purpose of congressional apportionment. In fact, section 141(d) only governs the mid-decade census, which is never to be used for apportionment, and thus has no bearing on the use of sampling for apportionment.

The plaintiff also points to the use of "census of population" in section 141(g) to suggest that the reference to

sampling in connection with a "census of population" in section 141(a) is no more than a general provision, not directed specifically to sampling in the context of apportionment. *Pl.Br.*28-29. According to the plaintiff, section 141(g) reinforces the vague, unfocused grant of authority of section 141(a) because the term "census of population," as used in both sections, means a census conducted to obtain, in plaintiff's words, "a myriad of demographic information," and says nothing about obtaining information specifically for apportionment. *Pl.Br.*28. Once again, however, the plaintiff overlooks the significance of section 141(b), a section that does specifically link the "census of population" referred to in section 141(a), for which sampling may be used, to the context of apportionment.

Nor is the plaintiff's reliance on section 193 tenable. The plaintiff argues that section 141 is a general provision that is "limited" by sections 193 and 195 and that section 195 provides "specific guidance" governing the use of "sampling and special surveys" outlined in section 141. *Pl.Br.*29. However, while section 193 may offer more "specific guidance" on the use of special surveys, the plaintiff does not argue — because it cannot — that section 193 contains a prohibition that runs counter to the so-called "general" authority granted in section 141.[9] Indeed, the "specific" guidance provided in section 193 recognizes the complete discretion accorded the Secretary in the use of preliminary and supplemental statistics. Similarly, consistent with section 193. section 195 should be read to respect section 141's

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[9] Section 193 states: "In advance of, in conjunction with, or after the taking of each census provided for by this chapter, the Secretary *may* make surveys and collect such preliminary and supplementary statistics related to the main topic of the census as are necessary to the initiation, taking, or completion thereof." 13 U.S.C. § 193 (emphasis added).

particular grant of discretion to the Secretary on the use of sampling.

Thus, section 141 — reading all of its subsections together — specifically grants the Secretary the discretion to use sampling in the decennial census for the purpose of congressional apportionment. Consistent with section 141, as discussed below, section 195 provides that the Secretary shall use sampling for non-apportionment purposes, but has discretion to use sampling in the case of apportionment.

The 1976 Amendments To Sections 141 And 195 Clearly Manifest Congress's Intent To Permit The Use Of Sampling For Congressional Apportionment

Further proof that section 195 should be read consistently with section 141 is found in the manner in which Congress amended sections 195 and 141 in 1976.

Section 195 currently states:

> Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

13 U.S.C. § 195.

In 1976, Congress amended both sections 195 and 141 so that the provisions read consistently together. The cardinal principle of statutory interpretation is to give effect to all of the provisions of a statute as a consistent whole.

See, e.g., Clark v. *Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 488-89 (1947) ("Our task is to give all of it [the entire statute] . . . the most harmonious, comprehensive meaning possible. . . . To do otherwise would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other.").

Specifically, Congress amended sections 141(a), 141(b), and 195 contemporaneously. Section 141(a) was amended to add the language "decennial census of population" and "in such form and content as he may determine, including the use of sampling procedures and special surveys." As discussed above, section 141(b) also was amended to include the phrase "under subsection (a) of this section" so that section 141(a) incorporated section 141(b)'s explicit reference to "the apportionment of Representatives in Congress among the several States." 13 U.S.C. § 141; *see* H.R. Rep. No. 94-944, at 11-13 (1976); *see* S. Rep. No. 94-1256, *reprinted in* 1976 U.S.C.C.A.N. 5463, 5466-67 (1976).

At the same time, Congress also amended section 195 to read consistently with section 141. To argue the contrary, the plaintiff writes, "[i]n 1976, Congress amended the second clause of § 195, changing 'may where . . . appropriate' to 'shall if . . . feasible,' but left the proviso in the first clause substantively intact." *Pl.Br.*37. The plaintiff's statement is misleading. The proviso in the first clause — "[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several States" — was not left intact, but in fact, was amended to use the same language as in section 141. Congress deliberately amended the phrase regarding "apportionment" in both section 195 and section 141(b) using identical language to describe the term "apportionment" so that the two sections worked harmoniously together in a

statutory scheme which encourages the use of sampling for purposes of apportionment.

Specifically, Congress, in 1976, made the following changes to section 195 and section 141(b). (In the quoted language below, previous law eliminated by the 1976 Amendments is enclosed in brackets; new matter is printed in italics.)

Section 195 was amended in this manner:

> Except for the determination of population for [apportionment purposes] *purposes of apportionment of Representatives in Congress among the several States*, the Secretary [may, where he deems it appropriate] *shall, if he considers it feasible*, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

13 U.S.C. § 195; Pub. L. No. 85-207, 71 Stat. 481 (1957); *see* H.R. Rep. No. 94-944, at 12-13 (1976); *see* S. Rep. No. 94-1256, *reprinted in* 1976 U.S.C.C.A.N. 5463, 5468 (1976).

Section 141(b) was amended as follows:

> The tabulation of total population by States *under subsection (a) of this section* as required for the apportionment of Representatives *in Congress among the several States* shall be completed within [eight] 9 months [of] *after* the census

> date and reported by the Secretary to the President of the United States.

13 U.S.C. § 141(b); Pub. L. No. 85-207, 71 Stat. 481 (1957); *see* H.R. Rep. No. 94-944, at 11 (1976); *see* S. Rep. No. 94-1256, *reprinted in* 1976 U.S.C.C.A.N. 5463, 5466-67 (1976).

Thus, it is apparent that Congress amended sections 141(a), 141(b) and 195 — all at the same time in 1976 — so that the separate provisions could be read harmoniously and consistently together to allow the use of sampling for the purpose of "apportionment of Representatives in Congress among the several States."

The Legislative History Reinforces The Plain Text's Grant Of Discretion To The Secretary To Use Sampling For Apportionment

The legislative history of the 1976 Amendments to the Census Act confirms that Congress's clear intent was to strengthen the use of sampling for a number of purposes, including congressional apportionment. Although it is unnecessary to review a statute's legislative history when its text is plain (as here), the plaintiff zealously argues that Congress's intent was to prohibit sampling for purposes of apportionment because "there was never *any* discussion, debate, or mention of a proposal to repeal the long-standing prohibition on the use of sampling for purposes of apportionment and to delegate unlimited discretion to the Secretary to determine the population on the basis of estimates." *Pl.Br.*40. That is simply not true.[10]

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[10] The plaintiff also cites a statement in the Conference Report regarding the amendment to § 141(a) to argue that "§ 141(a), as revised, (continued...)

Congress repeatedly stated its intent to strengthen the use of sampling in the decennial census for a number of purposes without any limitation. In fact, strikingly absent from the legislative record is any remark affirming that such a "long-standing prohibition on the use of sampling" was going to be maintained by the new statutory regime. To the contrary, in both the House and Senate Reports, Congress declared its intent that one of the primary purposes of the 1976 Amendments was to "direct the Secretary of Commerce to use sampling and special surveys in lieu of total enumeration in the collection of statistical data whenever feasible," S. Rep. No. 94-1256, *reprinted in* 1976 U.S.C.C.A.N. 5463, 5464 (1976), and to "strengthen[ ] the congressional intent that, whenever possible, sampling shall be used," H.R. Rep. No. 94-1719, *reprinted in* 1976 U.S.C.C.A.N. 5476, 5481 (1976).[11] Thus, in 1976, both houses of Congress indicated their intent to grant broader

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[10] (...continued)
is 'essentially the same as the provisions of existing law, except that a reference is made (as in the case of the mid-decade census) to the use of sampling procedures and special surveys.'" *Pl.Br.*42 (citations omitted). However, the plaintiff mischaracterizes the Conference Report's statement and the state of "existing law." First, by that statement, Congress explained that the 1976 Amendments did effect a change in the existing law with regard to its policy on the use of sampling procedures and special surveys. Second, as the plaintiff acknowledges, prior to the enactment of the 1976 Amendments, the Census Bureau had already used statistical sampling in the 1970 decennial census which was used to determine the population for congressional apportionment. *Pl.Br.*42-43.

[11] In its brief, the plaintiff disingenuously points to the "five legislative purposes" of the 1976 Amendments and argued that "[g]ranting the Secretary discretion to use sampling for apportionment is not among them." *Pl.Br.*41 n.56. However, as discussed above, one of the five purposes was to "direct the Secretary of Commerce to use sampling . . . whenever feasible," or in other words, to grant the Secretary discretion to use sampling without any prohibition for apportionment purposes.

discretion to the Secretary to use sampling in the decennial census for a number of purposes without prohibiting the use of this method for apportionment purposes.

Indeed, in its brief, the plaintiff concedes that Congress's tradition has been to afford the Secretary increasing discretion over the census process and that "Congress has delegated the Secretary greater authority over the course of time." *Pl.Br.*37 n.50. The plaintiff tries to downplay this legislative policy by pointing to two provisions in the 1976 Amendments that "actually constrained the Secretary's authority in several respects," *id.*, but notably, the plaintiff does not — indeed, could not — point to relevant sections 141(a), 141(b) or 195. That is because Congress's intent behind the 1976 Amendments to sections 141 and 195 was to strengthen the use of sampling for a number of purposes, including congressional apportionment.

* * *

Congress's intent to effectuate the policy shift to favor the use of sampling is clearly manifested in the 1976 Amendments to sections 141 and 195. Based on the plain language and rules of statutory interpretation, the two sections should be read together to permit the use of statistical sampling for a variety of purposes, including congressional apportionment. The plain text of section 141 alone manifests Congress's intent to authorize the Secretary to use "sampling procedures" in conducting the "decennial census of population," the census to be used for the "apportionment of Representatives in Congress among the several States." Section 195's plain language reasonably must be read also to allow the use of sampling in the decennial census for purposes of apportionment.

CONCLUSION

The Court should reverse the district court and vacate the order enjoining the use of statistical sampling in the 2000 census for the purpose of apportioning Representatives among the several states.

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